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UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 97B00101
	)	
IBP, INC.,	)	
Respondent.	)	
_____	)	

This is an action arising under the Immigration and Nationality Act (INA) as amended, 8 U.S.C. § 1324b, in which the Office of Special Counsel (OSC) alleges that the respondent IBP, Inc. (IBP) violated the so-called document abuse provision of the Act, § 1324b(a)(6), by refusing to honor a valid alien registration card which Ramiro Loza Placencia, a lawful permanent resident of the United States, presented to the company as evidence of his identity and his authorization for employment in the United States.

The Immigration Reform and Control Act of 1986 (IRCA), enacted as an amendment to the Immigration and Nationality Act, (INA), established a system of employment eligibility verification, 8 U.S.C. § 1324a, as well as prohibitions against certain unfair immigration-related employment practices, 8 U.S.C. § 1324b. The law made it illegal for an employer to hire any person knowing that person to be an undocumented alien, to hire any person without reviewing specified documents to verify the person's identity and work authorization status, or to discriminate against U.S. citizens or work authorized aliens on the basis of their citizenship status or national origin.

While IBP's brief contends that an employer can violate the Act only by requesting more or different documents than INS prescribes or by requesting specific documents, both the plain statutory language and the legislative history of the applicable provision clearly show otherwise.

The so-called document abuse provision, § 1324b(a)(6),<sup>1</sup> was added to the Act by the Immigration Act of 1990 (IMMACT). See H.R. Conf. Rep. No 955, 101st Cong., 2d Sess. §§ 534-535 (1990). Because of the continued fear of ongoing discriminatory actions against non-citizens or those perceived to be “foreigners,” Congress passed sub-paragraph six in order to address the discriminatory effect of “certain documentary practices.” United States v. Robison Fruit Ranch, Inc. 6 OCAHO 855, at 321 (1996),<sup>2</sup> rev’d on other grounds, 147 F.3d 798 (9<sup>th</sup> Cir. 1998). It provides:

A person’s or other entity’s request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice related to the hiring of individuals. (emphasis supplied)

As to the purpose of this provision, it was observed in United States v. Zabala Vineyards, 6 OCAHO 830, at 87 (1995), that:

There is precious little legislative history undergirding enactment of § 1324b(a)(6), but there can be no doubt in the context of the GAO and Task Force Reports that the seminal problem to be addressed was that of “employers’ refusal to accept or uncertainty about, valid work eligibility documents.” GAO Report at 86. As summarized by the Task Force, “Employers must understand that . . . [r]ejecting individuals who have proper documentation of their work eligibility is a violation of IRCA . . .” Task Force report at 51-52.

Regulations promulgated pursuant to the Act provide that an employer violates the law by

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<sup>1</sup> The section was amended prospectively by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, § 421, 110 Stat. 3009 (Sept. 28, 1996) as to acts occurring after October 1, 1996. The amendment has no application to this case. But see Robison Fruit Ranch, Inc. v. United States, 147 F.3d 798, 801 (9<sup>th</sup> Cir. 1998) (amendment simply clarifies original meaning of the statute).

<sup>2</sup> Citations to OCAHO precedents reprinted in bound Volumes 1 and 2, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, and Volumes 3 through 7, Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Law of the United States, reflect consecutive pagination within those bound volumes; pinpoint citations to those volumes are to the specific pages, seriatim, of the specific entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

rejecting a prospective employee's documents showing the person's work eligibility if those documents reasonably appear to be genuine and to relate to the individual. 28 C.F.R. § 44.200(a)(3).

### III. THE EVIDENCE SUBMITTED

#### A. OSC's Evidence

OSC's motion for summary decision is supported by attachments consisting of 1) the complaint, 2) the answer, 3) a partially completed I-9 form for Ramiro Loza Placencia, 4) the declaration of Claudia Allen, IBP's former assistant personnel manager, and 5) an INS Central Index System (CIS) printout for Ramiro Loza Placencia, A# 030214621. A photocopy of the disputed alien registration card also appears in the record appended to the charge of discrimination, which is in turn attached as an exhibit to the complaint.

##### 1) The Complaint and Answer

The complaint asserts, inter alia, that Ramiro L. Placencia applied for employment at IBP's Palestine, Texas facility, that he was interviewed by Claudia Allen, the assistant personnel director, and Jon Mulder, a corporate office recruiter, that he was offered employment, that on July 31, 1996, Placencia produced his alien registration card, social security card and driver's license at an orientation meeting in response to a request by Allen and Mulder for documents, but that both Mulder and the personnel manager Robert Morisette rejected the documents and refused to complete the hiring process. The OSC charge filed by Placencia and attached to the complaint asserts that "Claudia" initially told him his card was no good because the plastic was raised on one corner, but when he came back she told him the problem was a hyphen between his two last names and a comma between those names and his first name.

IBP's answer admitted that Placencia applied around July 12, but denied that either Allen or Mulder interviewed him or requested documents, stating instead that Gary Lovell interviewed him and told him to bring documents to the orientation, denied also that Placencia ever produced or that IBP ever rejected his social security card and driver's license, stating further that the only document Placencia produced was a mutilated alien registration card. IBP's answer contended that Jon Mulder informed Placencia that the card he presented was invalid because it had no photograph and was "deteriorated" and "illegible." Further, by way of defense, IBP's answer asserts that Placencia insisted on showing the card to Morisette, who also rejected it, and that when IBP subsequently learned that the card actually was valid, it made a Placencia an offer of employment.

##### 2) Other Documentary Evidence

Claudia Allen's declaration states that she worked in personnel for Calhoun Packing from 1991 until its purchase by IBP, that she continued with IBP until January 1997, that in July 1996 she

was the assistant personnel manager for IBP, that she served as an interpreter at Placencia's job interview at the request of Jon Mulder to whom Placencia initially presented his alien registration card, that Mulder would not accept the card and instead demanded a letter from INS and put a post-it note on the partially completed I-9 form stating that Placencia's ID was invalid. The note on the I-9 form reads: "Documents apper (sic) to not be genuine withdraw empl. 7/31." The Allen declaration states further that the card looked valid to her, that she would have accepted it, that the name and number on the card were legible, and that the picture and fingerprint were clear. She also stated that Placencia returned to IBP later on two other occasions: the first time he came back with a receipt from INS which was not accepted by Mulder, and the second time he returned Allen took him to Morisette who also rejected him for employment.

#### B. IBP's Evidence

IBP's opposition to the motion is supported by the Affidavits of Robert Morisette, the personnel manager at the Palestine, Texas facility of IBP, and of Burneill Ann Ott, IBP's Equal Employment Opportunity/affirmative action coordinator. The Morisette affidavit states that the affiant has been the personnel manager at IBP's Palestine facility for 16 months, has been with the company since 1984, was formerly personnel manager at the Joslin, Illinois facility and has eight years experience in Human Resources. It states further that he has had I-9 training by INS officials, that Claudia Allen has not, that he supervised her from August 1, 1996 to January 15, 1997, that she had difficulty identifying valid resident alien cards and made errors, that she was reprimanded for this reason and that "on August 20, 1996, the company became aware that she did not even do the simple task of comparing the photograph on the resident alien card with the person who was presenting it." Morisette states further that Allen gave her notice in December 1996.

The Ott affidavit states that the affiant has been the Equal Employment Opportunity/affirmative action coordinator for IBP since September 3, 1990, that she has assisted in training employees in I-9 completion, assisted in INS Inspections, participated in I-9 audits, and reviewed hundreds of documents. She states that she has worked with both Jonathan Mulder and Robert Morisette, and knows that they participated in training and dealt with numerous I-9s and related documents. Further, Ott asserts that she worked with Claudia Allen after IBP's purchase of Calhoun Packing and after receiving a Notice of Inspection from INS, that she found Allen's skill level to be low, that many of the Calhoun Packing Company's documents were fraudulent, and that for this reason she recommended that Morisette review all the I-9s and documents for new hires. In addition Ott states that during her investigation of Placencia's charge Morisette told her the card was badly damaged and the individual pictured could not be identified as the presenter. She asserts that Morisette had no incentive to reject potential employees because the plant was in dire need of workers and that the reason Morisette supported Mulder's decision to refuse the card was his inability to certify that the card related to the presenter.

#### IV. STANDARDS FOR SUMMARY DECISION

OCAHO rules provide for the entry of a summary decision where the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the party is entitled to summary decision. 28 C.F.R. § 68.38(c). The rule is similar to and modeled on Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in proceedings in the federal district courts, and OCAHO case law has long sought guidance in federal case law interpreting that rule to determine the appropriateness of summary decision. See, e.g., United States v. Fortune East Fashion, Inc., 7 OCAHO 977, at 912 (1997).

A party seeking summary decision has the burden of demonstrating to the trier of fact that there is no actual dispute as to any material fact. In determining whether there is a genuine issue, both the evidence and the inferences to be drawn from it are to be viewed in the light most favorable to the non-moving party. Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198 (5<sup>th</sup> Cir. 1995), Taylor v. Gregg, 36 F.3d 453, 455 (5<sup>th</sup> Cir. 1994) (per curiam), Matagorda County v. Law, 19 F.3d 215, 217 (5<sup>th</sup> Cir. 1994). If the moving party is successful in showing the absence of a genuine issue, it then becomes the responsibility of the opposing party to set forth specific facts to show that a reasonable fact finder could find for the nonmovant.

Under Rule 56(e) of the Federal Rules of Civil Procedure, evidence designed to establish the presence or absence of issues of fact for purposes of a motion for summary judgment must be presented through “vehicles designed to ensure reliability and veracity -- depositions, answers to interrogatories, admissions, and affidavits.” Friedel v. City of Madison, 832 F.2d 965, 970 (7<sup>th</sup> Cir. 1987). This means that supporting materials must be of “evidentiary quality,” that is, admissible documents or attested testimony. Winskunas v. Birnbaum, 23 F.3d 1264, 1267 (7<sup>th</sup> Cir. 1994). For similar reasons, OCAHO rules provide that affidavits submitted with such a motion should set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. §§ 556 and 557 and should show affirmatively that the affiant is competent to testify as to the matters stated therein. 28 C.F.R. § 68.38(b).

#### V. DISCUSSION

Although the pleadings themselves are not competent evidence upon which to grant or deny summary judgment, Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986), Dorsett v. Board of Trustees for State Colleges and Univers., 940 F.2d 121, 124 (5<sup>th</sup> Cir. 1991), they serve to highlight the contested issues between the parties, thus provide the background against which the probative value of the evidence submitted can be assessed. It is evidently no longer disputed that Placencia is authorized for employment. While there are some discrepancies in the pleadings as to exactly who at IBP interviewed Placencia, what other documents he may have presented, and the reason his card was rejected, it also appears undisputed that Placencia has a valid alien registration card, that on July 31, 1996, he presented an alien registration card to representatives

of IBP as evidence of his identity and eligibility for employment, and that IBP's representatives rejected the card he presented.

It is well established that an employer's obligation to examine documents evidencing a prospective employee's work eligibility does not require any particular expertise in ascertaining the legitimacy of the documents. Rather, the law and the regulations promulgated pursuant to it require only that the employer inspect one or more specific approved documents to make sure that the document or documents appear to be facially genuine and to apply to the particular job applicant. 28 C.F.R. § 44.200(a)(3). No more than a reasonable effort is necessary to ascertain whether the document in question is authentic. See H.R. Rep. No. 99-682(I), at 61-62 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5665-66. Compliance with the verification requirements is satisfied when an employer examines the specific document or documents set out in the statute and regulations to establish an individual's identity and employment eligibility, and attests that the documents reasonably appear to be genuine and to apply to the individual. Collins Foods Int'l, Inc. v. INS, 948 F.2d 549, 554 (9th Cir. 1991). Whether Placencia's alien registration card satisfies that description is at the heart of the parties' dispute.

In opposing OSC's motion, IBP asserts that summary decision must be denied because OSC ignored "conflicting testimony" as to the appearance of the card. IBP states that OSC's own investigator, Lisa Levine, conducted an investigation on OSC's behalf and that the interviews she conducted with IBP officials Robert Morissette, John Mulder, and Gary Lovell contradict OSC's version of events because each of them told Levine that the card was damaged or illegible. IBP has not, however, submitted competent evidence as to any statement made under oath by Morissette, Mulder, or Lovell as to the appearance of the card, and I find no "conflicting testimony" in the record on this point. Neither Ott's nor Morissette's affidavit directly addresses the hiring process and these affidavits appear to be aimed principally at impeaching the qualifications of Claudia Allen to assess the validity of resident alien cards, and her lack of training.

Morissette's affidavit does not refer in any manner to Placencia's interview, to the specific alien registration card or other documents Placencia allegedly presented, or to the reasons for IBP's rejection of the alien registration card either by Mulder or by him. Ott's affidavit reports that Morissette made an unsworn statement to her about the card, but his own affidavit says nothing at all about the card or its appearance. According to Ott's affidavit, Morissette told her that the card Placencia presented was badly damaged and that the individual pictured could not be identified as the presenter, but it does not appear from her affidavit that Ott herself has any personal knowledge as to the appearance of the card. Thus the only sworn testimony in the record about the appearance of the card by a person who actually saw it is that of Claudia Allen.

A party opposing summary decision bears the risk of failing to produce its own evidence. Argument in a brief is not evidence, and, contrary to IBP's implication, OSC has no obligation in seeking a summary decision to offer evidence on IBP's behalf. Whatever statements Morissette, Mulder, or Lovell gave OSC's investigator, they appear nowhere in the record. IBP's position as

to the appearance of Placencia's alien registration card has not been consistent. Its answer asserts that there was no photograph at all on the card and that Jon Mulder informed Placencia it was invalid because it had no photograph and was "deteriorated" and "illegible." Ott's affidavit testimony as to the unsworn statement Morisette made to her claims otherwise, but is not probative of anything more than the fact that he made the unsworn statement. While hearsay is readily admissible in OCAHO proceedings, no weight can be given assertions in an affidavit as to matters which are clearly beyond the personal knowledge of the affiant. 28 C.F.R. § 68.38(b). Ott is not a competent witness as to the observations, state of mind, or motivation of persons other than herself.<sup>3</sup>

OSC's brief argues that it is unnecessary for me to examine the original document in order to decide this case, evidently because it has now definitively shown that the document was, in fact, a valid one. The precise question, however, is not whether Placencia's card actually was valid, but rather whether it reasonably appeared on its face to be genuine and to relate to the individual who presented it. I do not believe this question is susceptible to resolution on summary decision. In the first place, the quality of the photocopy of the document in the record is not so clear that I can with confidence make a meaningful assessment of whether it appears to be genuine. Contrary to OSC's representations, the photocopy does not necessarily show that the document was not mutilated. Second, this is not the sort of determination which is reliably made on the basis of a swearing contest between various individuals as to whether or not they thought the card was valid, or which of them was better qualified to make that judgment. Even were I to simply view the original card, moreover, this would not assist me in making an assessment of whether or not the photograph resembles Placencia, and Allen's declaration is silent on this point. Such an assessment requires the opportunity to observe the presenter as well as the card.

Before summary decision may issue, it must be clear that the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. Szabo v. Errisson, 68 F.3d 940, 942 (5<sup>th</sup> Cir. 1995). That standard has not been met here because I am not prepared to hold as a matter of law based on a questionable quality photocopy that reasonable minds could not differ as to the validity of the card. Thus notwithstanding the apparent unwillingness of any of IBP's current managers to make a statement under oath about the appearance of the card, and notwithstanding IBP's shifting positions as to whether or not there was a photograph on the card, I nevertheless conclude that summary decision is inappropriate in this case because the evidence still requires an evaluative judgment between conflicting but rationally possible alternative

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<sup>3</sup> OSC did not object to or move to strike any portion of this affidavit, which ordinarily leads to a waiver of any objection. Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 457 (5<sup>th</sup> Cir. 1998), United States v. Kumar, 6 OCAHO 833, at 117 (1996), aff'd sub nom. Kumar v. INS, No. 96-70300 (9<sup>th</sup> Cir. Nov. 16, 1998)(table). It is not clear, however, that the requirement of personal knowledge is subject to waiver. See, e.g., Williams v. Evangelical Retirement Homes, 594 F.2d 701, 703-4 (8<sup>th</sup> Cir. 1979) (per curiam, dictum) (implying sua sponte duty).

conclusions. See 10A Charles Alan Wright et al., Federal Practice and Procedure § 2727 (3d ed. 1998).

As Judge Schwarzer instructs us, summary judgment is a case management tool, and like any tool it should be used with care and only in appropriate circumstances. William W. Schwarzer and Alan Hirsch, Summary Judgment After Eastman Kodak, 45 Hasting L.J. 1, 20 (1993). The issue in this case requires a judgment call: whether a reasonable person examining Placencia's alien registration card would have thought it to be genuine and to relate to him. At the end of the day, and with or without the opinions of various IBP personnel, that judgment call must necessarily be my own, and can only be made on the basis of my own observations both of the card and of the individual who presented it. For that reason, OSC's motion for summary decision will be denied.

#### ORDER

The motion of OSC for summary decision is denied. A telephonic prehearing conference will be held on February 22, 1999 at 3:00 p.m. (EST) to establish a final prehearing order in this matter and to set a hearing date for its final resolution.

SO ORDERED.

Dated and entered this 28<sup>th</sup> day of January, 1999.

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Ellen K. Thomas  
Administrative Law Judge